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In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT METZ BAKING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent Metz Baking Company ("Metz") does not accept Petitioners' Statement of the Case for two reasons. First, the complex procedural history of this case requires a supplementary statement concerning what happened below and why. Second, pursuant to Rule 15.1 of the Rules of the Supreme Court of the United States, there are certain "perceived misstatements of fact or law" in Petitioners' Statement of the Case.

The "rather tortured history of this matter"[1] commenced over ten years ago. The case has now been decided on its facts by Chief Judge Lyle Strom of the United States District Court for the District of Nebraska. His decision has been affirmed in all particulars by the Court of Appeals in a decision on the facts as reflected in the absence of case citations in the opinion.

Procedurally, there have been two arbitrations, two trials and two separate appeals to the Court of Appeals.

A. Supplementary Discussion Of Proceedings Below.

1. Arbitration Proceedings.

This case began in 1983 shortly after Metz Baking Company bought the assets of Interstate Brands Corporation, its failed competitor in the Omaha marketplace. The Interstate Brands Corporation ("IBC") plant was on Nicholas Street in Omaha, Nebraska. It was a newer plant than the Leavenworth Street plant in Omaha operated by Metz. After the purchase, the two work forces were consolidated into the newer plant. The former employees of IBC were end-tailed or placed on the Metz seniority list behind the existing Metz workers. The former IBC employees filed a grievance alleging that their seniority provisions were "unfairly and improperly implemented" by Metz. (App. 116). [All cites in this brief to "App." are to Petitioners' Appendix]

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[1] As Judge Lyle E. Strom referred to it. (App. 12).

The Arbitrator reviewed the Collective Bargaining Agreement whose terms covered both the Metz and former IBC workers. He determined that there was no provision within the Collective Bargaining Agreement covering merger of two work forces. (App. 118).

The Arbitrator further concluded that end-tailing was appropriate in view of the economic realities surrounding the transfer:

> . . . this is not a case involving the acquisition of a thriving business, but on the contrary, a failing enterprise. Prospects of continued employment [for the IBC workers] were bleak. Integration of Interstate employees on the seniority list by dove-tailing would have resulted in the layoff of approximately three times as many Metz employees as former Interstate employees . . . the hardship imposed on the Metz employees would be severe and disruptive of harmonious labor relations . . . [with respect to the former IBC employees] in the absence of the sale the probability of loss of jobs by attrition and ultimate closing of the plant was imminent.[2] (App. 124). (bracketed material added)

2. The First (Liability) Trial.

After losing the arbitration, Petitioners filed this "hybrid" action in which they sued the Union alleging violation of the Duty of Fair Representation ("DFR") owed to Petitioners and sued Metz alleging breach of the Collective

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[2] Petitioner suggest in their Brief that "no evidence was adduced" (in the first trial) that "the former IBC facility was a 'failing' enterprise." (Petitioners' Brief, p. 6). This is simply not the case. The arbitration itself was in evidence before the jury as Exhibit 3 and was replete with facts and findings that IBC was a failing enterprise. It is more accurate to say that this fact was known to all, was well-documented in the arbitration (which was in evidence), was not controverted, and needed no further elaboration in the first trial.

Bargaining Agreement in violation of 29 U.S.C. §185 (§301).[3] The trial of this action was bifurcated with an initial trial to the jury on liability and a subsequent bench trial on the remedy. Judge C. Arlen Beam[4] presided over the jury trial, which commenced on July 13, 1985 and concluded three days later on July 16, 1985. The jury returned Special Jury Verdicts in favor of the Petitioners.

Judge Lyle E. Strom, who presided over the second (remedy) trial, summarized the jury findings in the first (liability) trial as follows: (1) The Union breached its duty of fair representation to Petitioners; (2) The Union's failure to negotiate resulted in Petitioners being laid off [unilaterally by Metz] in March of 1983; (3) The Union's conduct tainted the arbitration; (4) Metz assumed and thereafter breached contractual seniority obligations to the Petitioners [again, through treating them as though they had no seniority -- by end-tailing them] and (5) Petitioners were laid off as a result of Metz's said breach.[5]

That is the extent of what the jury decided. The jury was not requested to decide the following issues: (1) How long the Petitioners would have been employed by Metz in view of the diminution in the number of jobs available for bakery workers at the plant; (2) Whether some or all of the Petitioners would nevertheless have been laid off after negotiations; (3) What method of merging seniority between the two seniority lists in the merged work force would have been selected; (4) What would have been the results of negotiations or of a vote on the question of merging seniority lists; and (5) Specifically,

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[3] There was also a second arbitration before the same arbitrator over the issue of whether Petitioners should receive severance pay for termination from IBC. The same arbitrator heard the second arbitration and awarded severance pay.

[4] Judge C. Arlen Beam has since been appointed and confirmed as a judge on the United States Court of Appeals for the Eighth Circuit.

[5] Paraphrased from Judge Strom's "Conclusions of Law" with bracketed material added. (App. 16).

would negotiations have resulted in end-tailing and laying off the former IBC workers. (App. 87-96).

Thus, the jury did not find which of the competing groups of workers – the IBC or the Metz workers – were entitled to the jobs at the Metz plant, or on what basis.

3. Judgment Notwithstanding The Verdict.

After the jury verdicts, Metz and the Union moved for judgment n.o.v., which Judge Beam granted on August 13, 1986. In his discussion of the duty to negotiate, Judge Beam concluded that the evidence at the first trial failed to establish a "causal connection between a failure to negotiate . . . and any harm that came to the Petitioners." (App. 71). Not only was there no indication the IBC workers could have obtained a Collective Bargaining Agreement which would have favored them, the evidence suggested the Metz workers, who outnumbered the IBC workers 2-1, would have voted down any such proposal:

> Thus, the evidence supports only the conclusion that if the Union had negotiated with Metz and obtained full recognition of IBC seniority for all of the IBC employees (end-tailing the Metz workers) or for some of them (dove-tailing with the Metz workers), the tentative proposal could not have been approved unless the members of the majority Metz group voted against their own economic interests . . .

(App. 72-73).

4. The First Court Of Appeals' Decision (After The Liability Trial).

In *Thomas v. Bakery, Confectionery & Tobacco Workers' Union Local #433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988) (hereinafter *Thomas*), the Court of Appeals reversed Judge Beam's judgment n.o.v. and reinstated the jury verdict. However, the Court of Appeals did not wholly reject Judge Beam's analysis concerning causation, but stated that "this argument goes to the issue of the proper

remedy." (App. 47). The Court of Appeals concluded there was an absence of evidence at the liability trial to determine what would have occurred but for the Union's breach of its duty of fair representation in failing to negotiate. This issue was placed in the remedy trial as directed by Footnote No. 1 of the Court of Appeals decision:

> The District Court should determine on remand who would have voted to ratify a negotiated solution to the consolidation problem. Determining who would have voted will help determine the range of solutions that would have been feasible, and this will help the Court determine *what would have occurred but for the Union's failure to negotiate.* Plaintiffs will bear the burden of proof, and if the evidence is simply too sketchy or uncertain to justify anything more than speculation, their remedy would be merely a declaratory judgment and perhaps nominal damages.

(App. 47, n.1) (emphasis supplied).

Therefore, the Court of Appeals directed a determination of what would have occurred with respect to merger of the two groups: this would be central to determining remedies for both the Union's breach of DFR and Metz' breach of contract. Seniority is no guarantor of a job. Here, both groups of workers had seniority, but there was a diminished number of jobs at the plant. The factual question for the second trial was what would have occurred upon consolidation but for the breaches of the Union and Metz.

Even without Footnote No. 1, the trial court at the remedy trial would have been required to determine what would have happened "but for" the acts in question. Since the existing Collective Bargaining Agreement did not answer the question of seniority upon consolidation, determining what probably would have happened is central to Petitioners' ability to establish any entitlement to damages.

This was recognized not only in Footnote No. 1 of the Court of Appeals' majority opinion, but also in the concurring and dissenting opinion by Judge Henley. He wrote that while there might be a violation of the DFR with regard to failure to negotiate, "there is no causal relationship between failure of

the Union to negotiate and any injury to Petitioners." (App. 59). He dissented from a remand of the case for remedy and presaged the result of the remedy trial stating:

> If there is no showing of probable injury, failure to negotiate should not call for reversal and remand for determination of a remedy.

(App. 60).

5. The Second (Remedy) Trial.

After a two-month trial,[6] the District Court concluded that Petitioners had not met their burden of proof to show a casual link between the breaches of the Union and Metz and any harm to Petitioners except for the equivalent of three month's wages. These findings are discussed in the first point in Argument.[7]

6. The Second Opinion Of The Court of Appeals.

Petitioners appealed the District Court's ruling, arguing, *inter alia*, that the issues raised in Footnote No. 1 in the first Court of Appeals decision did not affect all remedies and that the jury had already decided Petitioners were entitled to jobs

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[6] The Metz Workers, whose jobs the former IBC workers sought, were permitted to intervene in the second trial.

[7] The arbitrator and both trial judges reached essentially the same conclusion. The arbitrator found in the first arbitration conducted on April 26, 1983, that the Petitioners were properly end-tailed. (App. 124-25). Judge Beam granted the Defendants' motions for judgment n.o.v. because he concluded, *inter alia*, Petitioners could not establish a nexus between the failure to negotiate and breach of the Collective Bargaining Agreement. (App. 71). The effect of Judge Beam's ruling was to keep intact the arbitration which had approved end-tailing the former IBC workers. In the remedy trial, Judge Strom concluded that Petitioners had not carried their burden to demonstrate they would have obtained the diminished number of jobs upon consolidation of the plant. He further concluded, based upon virtually uncontradicted evidence, that Petitioners would have been end-tailed. (App. 18-22).

based on a "plant-wide" seniority basis. Therefore, a central question for decision before the Court of Appeals on the second appeal was whether Judge Strom had correctly followed and interpreted Footnote No. 1 or whether Petitioners' far more expansive interpretations of the original jury verdicts were correct.

Judge Arnold had written the first decision for the Court of Appeals, and he also wrote the decision for the Court of Appeals on the second appeal. *Thomas v. Bakery Confectionery and Tobacco Workers International Union Local # 433*, 982 F.2d 1215 (8th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3684 (Mar. 26, 1993). In his decision for the Court, Judge Arnold wasted no time in concluding that Judge Strom had properly interpreted the Court of Appeals's own Footnote No. 1:

> Plaintiffs first argue that the District Court erred in its application of Footnote No. 1. They argue that the jury found that had negotiations taken place, the Plaintiffs would never have been laid off, because any new agreement would have preserved their seniority rights. This, they add, is the law of the case, and this Court did not direct the District Court to re-examine the jury's determination as to the probable result of negotiations . . . *Having written this passage, we disagree.* (App. 4). (emphasis supplied).

The Court then explained what it had required of the District Court and why Petitioners' reading of the jury verdicts – a reading which they have repeated in their Petition – was flawed:

> *We expressly directed the District Court to determine "who would have voted to ratify a negotiated solution" so it could ascertain what would have occurred – that is, what the solution would have been – but for the failure to negotiate. Second, the plaintiffs have mischaracterized what the jury decided.* Contrary to the plaintiffs' argument, the jury did not find that an agreement preserving the plaintiffs' jobs would have been reached, but that they would not have been laid off in *March* had the

> Union negotiated. In fact, the jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations. (App. 4-5). (emphasis supplied).

The Court of Appeals then proceeded to reject each and every argument raised on appeal by Petitioners. (App. 5-10). From these adverse determinations, Petitioners now seek further review.

B. Perceived Misstatements Of Fact Or Law In Petitioners' Brief.

Metz Baking Company disagrees with certain aspects of the Statement of the Case made by Petitioners as follows:

1. The Collective Bargaining Agreement Did Not Make Provision For Seniority Upon Consolidation Nor Did The Jury Resolve That Issue.

The entire premise of Petitioners' first argument, that their rights under §8(d) of the N.L.R.A. have been violated, is that the Collective Bargaining Agreement provides and the jury found that Petitioners were entitled to plant-wide seniority rights as against the Metz workers, i.e., that upon consolidation of the two work forces, the IBC workers would have had "super-seniority." This premise is completely unsupported since:

(a) The Arbitrator concluded there was no provision in the Agreement governing merger of the two work forces. (App. 118).

(b) "The jury was never asked to resolve the dilemma between the Metz workers and the IBC workers or to decide who would have ended up with jobs after negotiations." (App. 5) (App. 87-96).

(c) The trial judge in the first trial concluded the Collective Bargaining Agreement did not provide for integration of work forces. (App. 70).

(d) The first decision of the Court of Appeals both implicitly and explicitly rejected any notion

that Petitioners were entitled to "super-seniority" or that this had been the finding of the jury and directed that the issue be remanded for resolution in the remedy trial. (App. 46-47).

(e) Judge Strom in the remedy trial concluded that there was no provision in the Collective Bargaining Agreement which governed merger of work forces and that the jury had not reached any conclusion on that issue. (App. 12, 16, 18).

(f) The second opinion of the Court of Appeals explicitly rejects Petitioners contention that seniority upon consolidation of work forces was resolved in the jury verdicts. (App. 5).

2. Contrary To Petitioners' Brief, The Court Of Appeals Made No Finding Of "Bad Faith" Upon Which Attorneys' Fees Could Be Based.

A premise of Petitioners' second argument – on attorneys' fees – is likewise unsupported. Petitioners argue in their brief that, " . . . the bad faith exhibited by both Metz and the Union, as reflected in the opinion of the Court of Appeals on the first appeal on this matter justifies an award of attorney fees based upon bad faith." (App. 37).

The difficulty with this argument is that the Court of Appeals has already expressly rejected it, stating it made no such finding:[8]

> . . . With regard to attorneys' fees, the plaintiffs claim that we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees. *The plaintiffs are straining a bit on this argument. The question of bad faith sufficient to justify an award of attorneys' fees was never before this Court* . . . (App. 8). (emphasis supplied).

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[8] Petitioners' argument is discussed in more detail in the Second Argument, *infra*, p. 24 et seq.

SUMMARY OF ARGUMENT

1. *The Decision of the Court of Appeals is Consonant with Federal Labor Law Principles including Section 8(d) of the National Labor Relations Act.* Petitioners neither litigated the §8(d) argument in the District Court nor in the Court of Appeals, and it should not now be the basis for granting the Petition. In any event, Petitioners as a premise for their §8(d) argument have "mischaracterized"[9] the jury verdicts – which never even determined how to consolidate work forces. Section 8(d) is not applicable because, *inter alia,* under the particular facts of this case, the Collective Bargaining Agreement did not resolve the consolidation problem. In fact, at issue here is almost a pure factual determination by the trial judge in the remedy trial of what would have occurred "but for" the breaches by the Union and Metz. The judge did not renegotiate the Collective Bargaining Agreement, but rather attempted to determine, based on the facts, what would have occurred in the collective bargaining process but for those breaches. A Petition should not be granted to reconsider factual determinations.

2. *Attorneys' Fees were Properly Denied in the District Court.* Petitioners argue that the Court of Appeals found "bad faith" in its first opinion sufficient to justify an award of attorneys' fees. The Court of Appeals in its second opinion rejected this same argument, stating it had made no such finding of "bad faith". Petitioners also argue for the first time in their Petition that attorneys' fees are a compensable element of damages against Respondents. The Court of Appeals could not have addressed this new argument. Generally, the Eighth Circuit follows the American Rule discussed *infra.* Finally, case law does not allow attorneys' fees against the employer unless there is "bad faith," and Judge Strom specifically found no "bad faith" on the part of the Respondents.

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[9] As the Court of Appeals labeled Petitioners' argument – an argument which they have repeated here. (App. 8).

3. *Prejudgment Interest is Discretionary with the Trial Judge.* District courts should be free to set damages which fit the circumstances of each case. Allowing District Courts discretion to award prejudgment interest enhances flexibility and the fashioning of appropriate awards. Where Respondents prevailed through much of the long procedural history of this case, where damages are not liquidated, and where only nominal damages might have been awarded, the District Court did not abuse its discretion in denying prejudgment interest. There appears to be no sound reason to take the N.L.R.B.'s current prejudgment interest rule – a rule which the N.L.R.B. could change in its discretion – and substitute that rule for the discretion and the Federal District Courts.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS IS CONSONANT WITH FEDERAL LABOR LAW PRINCIPLES INCLUDING SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT

A. This Petition Should Not Be Granted Where The Section 8(d) Issue Was Neither Pled Nor Argued Below.

Petitioners now allege that §8(d) of the N.L.R.A. has been violated because they have been deprived of rights under their Collective Bargaining Agreement and that damages should have been assessed accordingly. Petitioners neither pleaded nor argued §8(d) in the District Court. Before the Court of Appeals, Petitioners neither specifically mentioned nor cited §8(d) of the N.L.R.A. in their Assignments of Error nor in their Brief. The Court of Appeals did not, therefore, have an opportunity to discuss the §8(d) argument now made by Petitioners. Neither was the Court of Appeals able to address any supposed conflict between the actions of the Federal District Court in the remedy trial and decisions from other Courts of Appeal. As a consequence, where the §8(d) issue was not presented to the Court of Appeals, it should not

be presented here for the first time.[10] *See generally, EEOC v. Federal Labor Relations Authority,* 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986).

B. The Petition Should Not Be Granted Where Petitioners' Section 8(d) Argument Rests Upon Erroneous Assumptions.

As discussed more fully in the Statement of the Case, the Collective Bargaining Agreement in this case does not provide for consolidation of work forces or give Petitioners the diminished number of bakery jobs based on "plant-wide" seniority. Yet, Petitioners' §8(d) argument makes those unwarranted assumptions. The Petition should not be granted where it rests upon assumptions which find no support in the proceedings below.[11]

C. The Petition Should Not Be Granted Where Factual Determinations of Causation – Not Controverted Legal Issues – Form the Basis of the District Court's Decision.

1. Factual Determinations By Judge Strom Form The Basis Of The District Court's Decision And This Does Not Violate §8(d).

Judge Strom in his Memorandum Opinion found facts based on the evidence at the remedy trial.[12]

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[10] Neither was Petitioners' second argument (that attorneys' fees are compensable elements of damage,) discussed *infra,* presented to the Court of Appeals.

[11] As discussed *supra* under the Statement of the Case.

[12] Certain of the findings made by Judge Strom illustrate the factual nature of the causation dispute in the remedy trial: 1. "It would have been possible for Metz and the Union to have negotiated a solution to the post-merger seniority problem and posed it to the Union membership for ratification". (App. 18). 2. "If the Collective Bargaining Agreement had been modified, then there could not have been a grievance based on breach

These factual findings do not – as Petitioners argue – conflict with the Collective Bargaining Agreement. Rather, they commence where the Collective Bargaining Agreement stopped. Judge Strom neither rewrote nor renegotiated the Agreement. He did attempt to determine, based on the available evidence, what would have occurred but for the breaches of the Union and Metz. Determination of what would have occurred in the collective bargaining process does not violate §8(d) and is necessary to determine what would "make whole" Petitioners:

> . . . Similarly the make-whole remedy – which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to – provides money compensation as a

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of contract . . . " *Id.* 3. "Therefore, [there would have been] no need for arbitration". *Id.* 4. "[A]ny amendments to the seniority provisions of [the Collective Bargaining Agreement] would result effectively in a new agreement and would require submission to the [members] for their approval or ratification." (App. 19). 5. [The By-Laws of Union Local #433 provide]: "Article XI, Section 2, states: 'All basic agreements covering wages, hours, and working conditions will be *subject to the approval of a majority of the members covered in such agreement.*" (*Id.*, emphasis supplied). 6. "Clearly the membership entitled to vote would be the employees of Metz and IBC only as it was their respective contracts which would be modified." *Id.* 7. "[I]t is undisputed that, at the time of the merger of the two work forces in early March, the number of Metz employees eligible to vote significantly outnumbered the number of former IBC employees who could have voted." *Id.* at 19-20. 8. "By stipulation, Metz introduced 79 (seventy-nine) Affidavits from the Metz employees . . . supported by trial testimony in which each stated unequivocally that he or she would have voted to end-tail the former IBC employees." *Id.* at 20. 9. "Had such a proposal been presented for ratification, it is clear that the Collective Bargaining Agreement would have been modified, and the former IBC employees would have been legally end-tailed." *Id.* 10. "In such a situation, arbitration would not have been required, and no breach of contract or of a duty of fair representation could have occurred." *Id.*

> remedy for past wrongs. Combined with the traditional remedy, it imposes no present or future contract obligations . . . This approach is not forbidden by section 8(d) of the Act.

Int'l Union of Electrical, Radio and Machine Workers v. N.L.R.B., 426 F.2d 1243, 1252 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), *appeal on remand*, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974).

2. Causation Determinations are Factual in Nature.

A Petition for Writ of Certiorari would be improvidently granted where, as here, Petitioners simply disagree with the District Court's factual findings on causation. As this Court succinctly stated in *United States v. Johnston*, 268 U.S. 220, 227 (1925); "We do not grant certiorari to review evidence and discuss specific facts." (quoted with approval in *Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

The factor which sets this case apart from the 8(d) cases cited by Petitioners is that the Court of Appeals in its first decision directed that certain causation issues be addressed on remand during the remedy phase of the trial.[13] Although Petitioners now complain that they should not have been required to prove causation in the "damage and remedy" phase of the trial, the handling of causation issues in the remedy trial gave Petitioners a second chance to meet their burden of proof in showing "but for" causation.

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[13] The Union and Metz argued unsuccessfully in their Petition for Writ of Certiorari in 1987 that, *inter alia*, the Court of Appeals should not give Plaintiffs a second chance to prove causation when they had clearly not done so in the liability phase of the trial.

3. Where The Court Of Appeals Has Concurred With The District Court's Findings Of Fact, The Findings Should Not Be Overturned.

The Court of Appeals refused to overturn any of the District Court's findings – which were mainly factual findings – despite what it called the "numerous arguments" made against those findings on appeal. (App. 3).

This Court has been most reluctant to overturn factual findings made by the District Court and affirmed by the Court of Appeals:

> The District Court's finding essentially rests on its determination of factual issues. *United States v. Nixon*, 418 U.S. 683, 702, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. *Rogers v. Lodge*, 458 U.S. 613, 623, 73 L.Ed.2d 1012, 102 S.Ct. 3272 (1982). We therefore decline to overturn the findings of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals.

United States v. Doe, 465 U.S. 605, 613-14 (1984).[14]

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[14] Numerous other decisions of this Court establish that same principle: "The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). This same principle was followed in the earlier case of *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd in part, rev'd in part on other grounds*, 339 U.S. 605 (1950): "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See also, Branti v. Finkel*, 445 U.S. 507, 512, n.6 (1980) (declining to review findings of fact claimed to be clearly erroneous, "absent the most exceptional circumstances.")

4. Respondents Should Only Be Held Responsible For Damages Which They Caused.

Any Defendant, including an employer under §301, is liable only for damages which it proximately caused. In *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984), a back pay award to undocumented aliens was reversed. They had suffered retaliation for their Unionizing, but failed to prove their lawful entitlement to be present and employed in the United States during the back-pay period. This Court discussed the "cardinal" assumption that a back pay remedy must be "sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *See also, Richardson v. Communications Workers of America*, 486 F.2d 801, 806 n.7 (8th Cir. 1973) (approving jury instruction that in setting damages for wrongful discharge under §301, jury "should determine the period of time for which Plaintiff would likely have continued in the employ of the Defendant . . . in the absence of the unlawful discharge")[15].

This causation requirement is rooted in the basic policy underlying remedies: "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). Petitioners' suggestion that "causation" is not an integral part of contract damages is without support. As the late Professor Corbin has succinctly observed:

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[15] *Accord, Howard P. Foley Co. v. Int'l Brotherhood of Electrical Workers*, 789 F.2d 1421, 1423 (9th Cir. 1986) ("Generally, the remedy for breach of a collective bargaining agreement is limited to an award of compensatory damages. To be compensatory, there must be a causal relationship between the company's violation of the agreement and the loss claimed by the employee.") [Citations omitted]; *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979) (applying "requirement that compensatory damages be based upon cognizable loss causally traceable to breach"); *M.S.P. Indus., Inc. v. N.L.R.B.*, 568 F.2d 166, 180 (10th Cir. 1977) ("Back pay is awarded only for the period during which the worker would have worked in the absence of discrimination.")

> *It is only when the other party has committed a breach that he can be so charged; and even then the compensatory damages are limited to those losses and pecuniary disappointments that are "caused" by the breach.*

5 Corbin on Contracts, §992 (1964 ed.) (emphasis supplied).

This causation requirement has led a number of courts, both under §301 and other laws regulating the employment relationship, to limit damages because of a factual finding that the worker would have lost his or her job anyway had the act or breach not occurred. For example, the Eighth Circuit Court of Appeals has held in an analogous age discrimination case that entitlement to substantial relief depends on "recreating the circumstances that would have existed but for the illegal discrimination; aggrieved persons are not entitled to recover damages for the period beyond which they would have been terminated for a nondiscriminatory reason." *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982). Similarly, in *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1209-10 (7th Cir. 1989) the court cut off damages at the point after which the employee would have lost his job due to a reduction in force based on legitimate, nondiscriminatory criteria.[16] The specific causation rules stated in these cases

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[16] *See also, Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 159 (6th Cir. 1988) (damages for lost pay limited to period between illegal discharge and time employer would have terminated his position for a nondiscriminatory reason); *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, (11th Cir. 1986) (damages cut off when Plaintiff's job would have been eliminated due to post-termination company reorganization); *Walker v. Ford Motor Co.*, 684 F.2d 1355, (11th Cir. 1982) (damages limited to duration of training program from which Plaintiff was illegally terminated, but not beyond because of lack of proof that Ford would have employed Plaintiff after training); *Bhaya v. Westinghouse Electric Corp.*, 709 F.Supp. 600, 605 (E.D. Pa. 1989), *aff'd*, 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 2827 (1991) ("If Plaintiffs would have been laid off for permissible reasons sometime after December 1982, then plaintiff's damages should have been limited accordingly. Any subsequent loss of pay simply was not caused by defendant's discrimination.").

mirror the general rule of contract law that substantial damages depend upon demonstration of actual injury proximately caused by the breach. Restatement (Second) of Contracts, §346(2) (1981). "Because a collective bargaining agreement is a contract and enforceable as such, the traditional criteria for the ascertainment of damages where a contract has been breached – foreseeability and proximate cause – are applicable." *Airco Speer Carbon-Graphite v. Local 502*, 479 F.Supp. 246, 256 (W.D. Pa. 1979).

5. In Recreating The Circumstances That Would Have Existed But For The Breach, The District Court Properly Found That The Parties Would Have Agreed To End-Tail The Petitioners.

Judge Strom followed the Court of Appeals' direction in *Thomas* to determine "what would have occurred but for the Union's failure to negotiate." In cases involving the employment relationship, courts often must turn back the clock to recreate what would have occurred but for a breach.[17] Of course, "recreating circumstances," as *Gibson, supra*, suggests, is hypothetical, but so are *any* damage determinations as Professor Corbin aptly noted:

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[17] *EEOC v. Mike Smith Pontiac GMC*, 896 F.2d 524 (11th Cir. 1990) (back pay damages rested on court's determination of what would have happened had complainant been hired and entered the training program); *United Industrial Syndicate, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982) (the fundamental measure of contract damages is that which places the non-breaching party in the position it would have been in but for the breach); *Mann v. Weyerhaeuser Co.*, 703 F.2d 272 (8th Cir. 1983) (the object of damages is to put the party in the position he would have been in had the contract not been breached); *Chicago Painters and Decorators Pension, Health and Welfare, and Deferred Savings Plan Trust Funds v. Karr Brothers, Inc.*, 755 F.2d 1285 (7th Cir. 1985) (breach of contract damages should place the aggrieved party in the place he would have been in had the breach not occurred); *Foster v. Univ. of Arkansas*, 938 F.2d 111 (8th Cir. 1991) (absent racial discrimination, the Plaintiff would have been terminated anyway).

> In determining the amount of . . . compensation as the "damages" to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised. It goes without saying that this aim can never be exactly attained. *The position that one would have occupied if history had been different is purely hypothetical. And yet that is the problem that the trial court and jury are required to solve.*

5 Corbin on Contracts, §992 (1964 ed.) (emphasis supplied).

Judge Strom found that whether requested by the Union or by Metz, negotiations would have yielded a proposal to end-tail the IBC workers and the proposal would have carried by a substantial margin of votes of the workers involved. (App. 19-20).

The evidence also supports Judge Strom's finding that the only Union members who would have been allowed, under Union rules, to vote upon ratification of a modification proposal were the Metz and IBC employees. (App. 19). The Union's own interpretations of its By-Laws and Constitution were entitled to deference, and supported Judge Strom's conclusion that both Metz and IBC workers would have voted. (T 2180-81). *Allen v. United Transportation Union*, 964 F.2d 818 (8th Cir. 1992). Judge Strom's reconstruction of the vote is no different from any number of cases in various fields of the law in which damages depended on reconstructing events that did not occur because of a breach. *See Corbin, supra.* The fact that a vote is involved changes nothing.

For example, in *N.L.R.B. v. Aeronautical Indus. Dist. Lodge No. 91*, 934 F.2d 1288 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1161 (1992), a Union official, went through a series of layoffs by both his employer and his Union, and was the victim of a number of unfair labor practices by his Union. 934 F.2d at 1290-92. The Second Circuit upheld a full back pay award and found sufficient evidence before the Board making it reasonable to find that he would have been reelected in 1986 even though he was not, in fact, a candidate then. *Id.* at 1296-97. Even the fact that he actually ran and lost in 1990

was irrelevant since he had not had the opportunity to establish his incumbency history. *Id.* at 1298. The court held that the evidence before the Board was sufficient to infer successful reelection campaigns in 1986 and 1990. *Id.* at 1297-98.[18]

6. A Negotiated Agreement To End-Tail The Petitioners Would Have Complied With The Union's Duties To All Affected Members.

The record in this case fully supports Judge Strom's findings that the Union would have acted within the bounds of its duty of good faith and fair representation in approving a proposal to end-tail the Petitioners. As he observed: "Negotiating seniority provisions is a duty uniquely within the province of the bargaining agent. The Union is free to renegotiate seniority provisions [subject only] to its obligation to treat all members fairly." (App. 18). *See generally, Air Line Pilots Ass'n Int'l v. O'Neill,* 111 S.Ct. 1127 (1991).

Seniority is a contract right existing solely by reason of the Collective Bargaining Agreement, not by reason of statute, and in negotiating with an employer a Union has both the power to create seniority for its members and the power to modify or destroy those rights in the interest of all of its members. *Elder v. New York Cent. R. Co.,* 152 F.2d 361, 365

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[18] *See also, Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), which involved the results of a runoff election between two candidates for the Democratic nomination for the Governor of Alabama. One candidate illegally encouraged 14,000 voters who had voted Republican in the primary to vote in the runoff. *Id.* at 1306. This same candidate then won by 9,000 votes. *Id.* at 1305. On appeal, the Eleventh Circuit Court of Appeals held that the party contesting the election met its burden under Alabama law to show that the winning party did not receive the required number of votes. *Id.* at 1313-14.

Curry is significant here because it is additional authority that a reconstructed vote can be the basis for determining rights. The evidence in the present case of how the vote would have turned out, including Affidavits of the majority of potential voters, is much more substantial than the evidence relied upon in *Curry*. Moreover, it was Petitioners who unsuccessfully bore the burden of proof.

(6th Cir. 1945). The incidents of seniority can be freely altered or amended by modification of the Collective Bargaining Agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).[19]

Such an agreement under the circumstances of this case would have been well supported by objective justifications. (*See generally*, the first arbitration (App. 113-128) and its findings concerning the economic realities favoring the Metz workers.) The Metz workers had helped put Metz Baking Company in position to buy out its competitor and use the acquired plant to make goods under Metz' brands rather than under IBC's.[20] The Metz workers were the "surviving group."

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[19] A number of cases have held that a Union did not breach its duty of fair representation by its negotiation of end-tailed seniority agreements. *See e.g., Bruen v. Local 492 Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO*, 313 F. Supp. 387 (D.N.J. 1969), *aff'd* 425 F.2d 190 (3rd Cir. 1970); *Brown v. Truck Drivers and Helpers Local Union No. 355*, 292 F. Supp. 125 (D.Md. 1968), *aff'd* 416 F.2d 1333 (4th Cir. 1969). In addition, in cases arising under §301, courts have determined that Unions did not breach their DFR by their manner of handling grievances of employees who had been end-tailed following a merger, acquisition or change of operations by an employer. *Keeley v. Refiners Transp. and Terminal Corp.*, 60 Lab. Cas. ¶10,214, (E.D. Mich. 1969); *Brady v. Consolidated Freightways Corp.*, 82 LRRM 2245, 70 Lab. Cas. ¶13,417 (S.D. Ohio 1972); *Hardin v. Strickland Transp. Co.*, 404 F. Supp. 585 (E.D. Mo. 1975); *Bernard v. McLean Trucking Co.*, 429 F. Supp. 284 (D. Kan. 1977); *Turley v. Hall's Motor Transit Co.*, 296 F. Supp. 1183 (M.D. Penn. 1969). There are numerous additional cases which support end-tailing upon the merger or consolidation of companies and hold that, in acquiescing, the Union does not violate §301. *See generally*, Annotation, *Union's Duty of Fair Representation in Merging Seniority Lists*, 42 A.L.R. Fed. 69 at §§13-17 (1974).

[20] Similarly, the court in *Baker v. Newspaper & Graphic Communications Union, Local 6*, 461 F. Supp. 109 (D.D.C. 1978), *aff'd in part, vacated in part on other grounds*, 628 F.2d 156 (D.C. Cir. 1980), granted summary judgment against an employee group complaining about a new agreement changing their existing seniority rights. The court found that there were "well-known, objective reasons for the Union's acceptance of the agreement, and the absence of any evidence of discrimination . . . ." *Id.*

The Petitioners had been part of a failing business and likely would have lost their jobs in the near future in any event.[21]

If there had been a change in the Collective Bargaining Agreement, there would have been no arbitration, and, therefore no damage associated with the Union's breach of its DFR concerning the original arbitration.[22]

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at 113. The contract was not arbitrary or discriminatory. "Rather it represented a freely arrived at compromise reflecting both the legal and moral duties of the parties and the economic realities confronting them." *Id.* at 116.

[21] A majority's vote to favor itself was upheld in *Britt v. Trailmobile Co.*, 179 F.2d 569 (6th Cir.), *cert. denied*, 340 U.S. 820 (1950). After Trailmobile absorbed a company called Highland and assumed all of its obligations, Trailmobile employees, who had been represented by a different Union and who outnumbered the Highland employees by 10 to 1, voted to join the Union representing Highland employees and to approve a new contract that end-tailed the Highland workers behind the Trailmobile workers in the merged labor group. The court found no discrimination and approved the arrangement. *Id.* at 572-73.

[22] The testimony of Union President Church at the second trial indicated that once a Collective Bargaining Agreement has been altered, it is binding upon the membership. (T:2197-98). The uncontroverted evidence, as demonstrated *supra*, is that alteration in the seniority provisions of the Collective Bargaining Agreement would have favored the Metz workers. (T:2253). Church testified no grievance would have been processed with respect to any change in the Collective Bargaining Agreement since that would not be a proper subject of arbitration. (T:2197). Thus, as Judge Strom found, a change in the Collective Bargaining Agreement would have been in lieu of an arbitration on the seniority issues. (App. 20).

Even if another arbitration had been conducted, the evidence at the remedy trial demonstrated that the Collective Bargaining Agreement would have been altered to end-tail the Petitioners. (T:2253). Since an arbitration draws its essence from the Collective Bargaining Agreement, the arbitrator could not have varied that result. *See generally, United Steel Workers Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

II.

ATTORNEYS' FEES WERE PROPERLY DENIED BY THE DISTRICT COURT

Petitioners' argument that attorneys' fees are properly an element of compensatory damages was not raised before the Court of Appeals. Instead, Petitioners argued that the District Court had improperly denied attorneys' fees because there was "bad faith" on the part of both the Union and Metz. As the Court of Appeals described Petitioners' argument concerning attorneys' fees: "With regard to attorneys' fees, the Petitioners' claim we had already found the Union guilty of bad faith. Therefore, they reason, the District Court was required to award attorneys' fees." (App. 8). The Court of Appeals rejected this argument by simply noting the issue of "bad faith" sufficient to justify an award of attorneys' fees "was never before this Court." (App. 8). In addition, Judge Strom had specifically concluded: "There is no evidence of such [bad faith] conduct by defendants in the instant case." (App. 29). Finally, the Court of Appeals wrote that even if there had been a finding of bad faith, attorneys' fees were still discretionary. (App. 8).

Petitioners may not now raise a justification for attorneys' fees which was not assigned as error or litigated in the Court of Appeals. When issues are not argued below, the Court of Appeals has no opportunity to consider the merits of such an argument and this Court is without the benefit of the Court of Appeals' analysis and conclusions on the issue. The Supreme Court will not ordinarily consider an issue which was neither raised before nor considered by the Court of Appeals. *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147, n.2 (1970). The Supreme Court declined to consider issues which were not presented to the Court of Appeals in *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986):

> Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. Under these circumstances, several central issues on which resolution of the question presented

> may well turn cannot be reached or resolved. Accordingly, we dismiss the writ of certiorari as improvidently granted. (Citations omitted).

Even assuming *arguendo* that Petitioners may raise this new argument,[23] the Courts of Appeals which permit attorneys' fees as a compensable element of damages have not held the employer liable for attorneys' fees on this theory.[24]

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) this Court held that in conformity with the "American Rule", and in the absence of specific statutory

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[23] This Court has earlier rejected a Writ of Certiorari on this same issue in a case where it was actually litigated below: *Scott v. Teamsters Local Union 377*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977).

[24] *Stanton v. Delta Air Lines, Inc.*, 669 F.2d 833 (1st Cir. 1982) (damages assessed against union included plaintiff's legal costs incurred in processing grievance against employer); *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289 (3rd Cir. 1988) (employee was not entitled to recover attorneys' fees against employer under §301 – however, employee was entitled to consequential damages from the union, equal to the amount incurred in bringing claim against employer); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439 (4th Cir. 1980) (court found union liable to employee for expenses incurred in employee's grievance against employer; case remanded to the district court to determine a reasonable amount of attorneys' fees and costs); *Seymour v. Olin Corp.*, 666 F.2d 202 (5th Cir. 1982) (union liable for employee's attorneys' fees); *Scott v. Local Union 377*, 548 F.2d 1244 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) (element of compensatory damages in employee's §301 suit against union includes attorney fees incurred in employee's suit against employer); *Bagsby v. Lewis Bros., Inc.*, 820 F.2d 799 (6th Cir. 1987) (*Alyeska* case precluded award of attorneys' fees against employer – however, attorneys' fees could properly be assessed against union pursuant to *Scott, supra*); *Zuniga v. United Can Co.*, 812 F.2d 443 (9th Cir. 1987) (in employee's action against union, one of the elements of damages is amount employee spent on attorneys' fees in case against employer). *But see Bennett v. Local Union No. 66*, 958 F.2d 1429 (7th Cir. 1992) (where union and employer participated in each other's breach of duty, union and employer were jointly and severally liable for back pay and attorneys' fees).

authority or other express authorization, or bad faith, each litigant must bear the expenses of its own attorney.

The United States Court of Appeals for the Eighth Circuit has followed this Court's decision in *Alyeska* in concluding that attorneys' fees cannot be levied against the employer where, as here, there is no "bad faith":

> Attorneys' fees are ordinarily not recoverable by the prevailing party in federal litigation absent either statutory authorization or circumstances in which the losing party has acted in bad faith.

General Drivers, Helpers and Truck Terminal Employees, Local No. 120 v. Sears, Roebuck & Co., 535 F.2d 1072, 1076 (8th Cir. 1976).

But whatever the pre-existing law in the Court of Appeals has been, the issue of attorneys' fees as a compensable element of damages was not presented to the Court of Appeals in this case and we do not know but can only speculate how the Court of Appeals would have resolved that precise issue. In the absence of a decision on this issue below, the issue should not be decided in this case now. *Id.* at 247.

III.

PREJUDGMENT INTEREST IS DISCRETIONARY WITH THE TRIAL JUDGE

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court stated that in hybrid §301 actions such as this great discretion should be given to the lower court in fashioning remedies:

> The appropriate remedy for a breach of a Union's duty of fair representation must vary with the circumstances of the particular breach . . .
>
> In such situations, the Court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief . . .

Id. at 195-96.

No prejudgment interest was awarded by the trial judge at the remedy trial. (App. 32). The Court of Appeals affirmed,

concluding in pertinent part that: "An award of prejudgment interest is within the discretion of the trial judge; it is never automatic. We see no evidence here that the District Court abused his discretion." (App. 8).

Prejudgment interest is discretionary with the trial court. *See also, Wolf v. Frank,* 477 F.2d 467, 479 (5th Cir.), *cert. denied,* 414 U.S. 975 (1973).[25] "The award of prejudgment interest in an action under §301 of the Labor Management Relations Act, 29 U.S.C. §185, is within the discretion of the trial judge." *Chrysler Motors v. Int'l Union,* 959 F.2d 685, 689 (7th Cir.), *cert. denied,* 113 S.Ct. 304 (1992).

It is up to the trial court to determine whether prejudgment interest is necessary for fair compensation, or whether it is unfair to Respondents to add interest to an award which could not reasonably or certainly be calculated at an earlier stage of the proceedings. In the present case, for example, the Respondents prevailed during much of the case's chronology, as is evident from the Statement of the Case. The very existence of an award in excess of nominal damages was in doubt based upon Petitioners' lack of causal evidence in the remedy trial as is evidenced by the varying amounts of judgments awarded by the trial judge to each of the 40 individual and unique Petitioners' cases. *See e.g., Laday v. Chicago M. St. P.& P.R. Co.,* 422 F.2d 1168 (7th Cir. 1970).

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[25] A district court's exercise of discretion in refusing to grant prejudgment interest has often been upheld in federal employment and labor cases. *MacDissi v. Valmont Industries, Inc.,* 856 F.2d 1054, 1061 (8th Cir. 1988) (prejudgment interest denial discretionary with trial court); *see also, Blim v. Western Electric Co.,* 731 F.2d 1473, 1479-80 (10th Cir.), *cert. denied,* 469 U.S. 874 (1984) (prejudgment interest not granted); *Rose v. National Cash Register Corp.,* 703 F.2d 225, 230 (6th Cir.), *cert. denied,* 464 U.S. 939 (1983) (prejudgment interest not proper); *Kolb v. Goldring, Inc.,* 694 F.2d 869, 875 (1st Cir. 1982) (prejudgment interest not awarded); and *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1114 (4th Cir.), *cert. denied,* 454 U.S. 860 (1981), *on remand,* 548 F.Supp. 104 (W.D.N.C. 1982), *aff'd in part, rev'd in part,* 717 F.2d 114 (4th Cir. 1983) (award of prejudgment interest not granted).

Prejudgment interest is not imposed as a matter of right. *See Board of Commissioners v. United States*, 308 U.S. 343, 352 (1939) (interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness; it is denied when its exaction would be inequitable); *Blau v. Lehman*, 368 U.S. 403, 414 (1962). In *Oil, Chemical & Atomic Workers Int'l Union Local No. 4-447 v. American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977), the Court, in a §301 case, held that prejudgment interest is purely discretionary and failure to award prejudgment interest is well within the discretion of the District Court. *Id.* at 1144.

Petitioners argue that the ability of the District Courts to fashion awards within their own discretion, as permitted by *Vaca v. Sipes, supra*, should be circumscribed. They argue instead, for a rule that would bring the federal courts into lockstep with the National Labor Relations Board in order that there should be a "consistent" federal labor policy. Yet, when this Court in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) permitted the N.L.R.B. to devise its own remedies, there was no accompanying rule or rationale that the N.L.R.B. would set policies for the Federal District Courts.

In *Lodges 743 and 1746 v. United Aircraft Corp.*, 534 F.2d 422 (2nd Cir. 1975), *cert. denied*, 429 U.S. 825 (1976), *appeal on remand*, 604 F.2d 4 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit concluded that it would be fundamentally unfair and inequitable to allow prejudgment interest to the prevailing Plaintiff prior to the time when a judicial body determined the liability and damages due from the Defendant, where the damage award was unliquidated and not readily ascertainable and certain. That Court denied a request made therein that it should adopt the prejudgment interest rules and standards set by the N.L.R.B. as follows:

> We, of course, agree that the decision whether to award prejudgment interest is governed by federal law . . . But from this premise does not flow the conclusion that remedies adopted by the N.L.R.B.

> are to be mechanically adopted by the courts in section 301 actions. *Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts. There seems no sound reason why we should not take the same approach in suits under section 301 rather than rigidly adopt the identical remedies employed by the N.L.R.B. on actions involving unfair labor practices.*

534 F.2d at 446. (emphasis supplied).

Where, as here, damages are unliquidated, and where the chronology of the case demonstrates no dilatory or bad faith conduct, but, instead, substantial periods where Respondents prevailed, prejudgment interest need not and should not be awarded.

CONCLUSION

For the foregoing reasons, Petitioners have not met their burden of demonstrating that this Writ of Certiorari should be granted. In fact, this case involved factual decisions of essentially uncontroverted issues in a case where the Collective Bargaining Agreement did not answer the factual question of which group of workers would have obtained jobs in the consolidation of two work forces. The decision of the Court of Appeals should be affirmed, and the Writ of Certiorari should be denied. In addition, for all of the foregoing reasons, Petitioners' request for summary disposition in their favor is without merit and should be denied.

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